Supreme Court, U. S.
FILED
FEB 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

Nos. 75-975 and 75-976

No. 75-975

GOVERNMENT OF INDIA,

Petitioner,

-against-

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION, and THE UPJOHN COMPANY.

Respondents.

No. 75-976

IMPERIAL GOVERNMENT OF IRAN,

Petitioner,

-against-

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION, and THE UPJOHN COMPANY.

Respondents.

On Petition For a Writ of Certiorari to
The United States Court of Appeals
For the Eighth Circuit

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

(List of Counsel on Reverse Side of Cover)

1976—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

SAMUEL W. MURPHY, JR.
Donovan Leisure Newton
and Irvine
30 Rockefeller Plaza
New York, New York 10020
212-489-4118

PETER DORSEY
MICHAEL E. BRESS
Dorsey, Windhorst, Hannaford,
Whitney & Halladay
2300 First National Bank Building
Minneapolis, Minnesota 55402
612-340-2607

Counsel for American Cyanamid Company

JULIAN O. VON KALINOWSKI
ROBERT E. COOPER
Gibson, Dunn & Crutcher
515 South Flower Street
Los Angeles, California 90071
213-488-7000

JOE A. WALTERS
O'Connor & Hannan
3800 IDS Tower
Minneapolis, Minnesota 55402
612-341-3800

JOHN H. MORRISON
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601
312-861-2000

Counsel for Pfizer Inc.

MERRELL E. CLARK, JR.
Winthrop, Stimson, Putnam
& Roberts
40 Wall Street
New York, New York 10005
212-WH 3-0700

*Counsel for Bristol-Myers
Company*

ALLEN F. MAULSBY
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005
212-HA 2-3000

*Counsel for Squibb Corporation
and Olin Corporation*

ROBERTS B. OWEN
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
202-452-6000

*Counsel for The Upjohn
Company*

GORDON C. BUSDICKER
Faegre & Benson
Northwestern Bank Building
Minneapolis, Minnesota 55402
612-338-7571

*Counsel for Bristol-Myers Company,
The Upjohn Company,
Squibb Corporation and
Olin Corporation*

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes and Rules Involved	2
Statement	3
Reasons the Writ Should Not Be Granted	7
I. The Question Whether Foreign Sovereigns Can Sue under the Antitrust Laws as *Parens Patriae* or as "Official Representatives" Should Not Be Decided before the Basic Question of the Standing of Foreign Sovereigns To Sue in Any Capacity under Those Laws Is Resolved	7
II. The Decision Below Is Correct	14
III. There Is No Conflict of Decisions	18
Conclusion	21

CITATIONS

Cases:

American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966) 4
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 18
California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973) 15
Chas. Pfizer & Co. v. FTC, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969) 4
Georgia v. Evans, 316 U.S. 159 (1942) 9
Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) .. 15
Gretener, A.G. v. Dyson-Kissner Corp., 298 F. Supp. 350 (S.D.N.Y. 1969) 20
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 19, 20
Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) 10, 15, 16, 17, 19
In Re Antibiotic Antitrust Actions; State of Kuwait v. Chas. Pfizer & Co., 333 F. Supp. 315 (S.D.N.Y. 1971) 4
In Re Multi-district Vehicle Air Pollution, 481 F.2d 122 (9th Cir. 1973), *cert. denied*, 414 U.S. 1148 (1974) 15
Interamerica Refining Corporation v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970) 12
Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement, 451 F.2d 727 (2d Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) 20
Maltina Corp. v. Cawy Bottling Company, 462 F.2d 1021 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972) 18
North Carolina v. Chas. Pfizer & Co., 384 F. Supp. 265 (E.D.N.C. 1974), *aff'd*, 1975-2 Trade Cases ¶ 60,663 (4th Cir. Jan. 12, 1976) 4
Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert denied*, 409 U.S. 950 (1972) 12

Pfizer Inc. v. Honorable Miles W. Lord, 456 F.2d 532 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972) 4
Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 309 F. Supp. 1057 (E.D. Pa. 1969), *aff'd sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971) 15
Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir. 1966) 16
Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 375 F. Supp. 610 (E.D. Pa. 1974) 20
United Brands Company, 2 CCH Comm. Mkt. Rep. § 9800 (Dec. 17, 1975) 20
United States v. Brand Jewelers, Inc., 318 F. Supp. 1293 (S.D.N.Y. 1970) 17
United States v. Chas. Pfizer & Co., 426 F.2d 32 (2d Cir. 1970), *aff'd by an equally divided Court*, 404 U.S. 548 (1972), *on remand*, 367 F. Supp. 91 (S.D. N.Y. 1973) 4
United States v. Cooper Corp., 312 U.S. 600 (1941) 8, 9, 10
United States v. San Jacinto Tin Co., 125 U.S. 273 (1888) 17
West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) 4, 19

Statutes:

Clayton Act § 4, 15 U.S.C. § 15 .....2, 3, 4, 7, 8, 11
Clayton Act § 4a, 15 U.S.C. § 15a 9
28 U.S.C. § 1292b 4, 5, 8
28 U.S.C. § 1407 3

Miscellaneous:

S 1284, 94th Cong., 1st Sess. (1975) 19
H.R. 12921, 93rd Cong., 2d Sess. (1974) 19
21 CONG. REC. 2564 (1890) 10
Fed. R. Civ. P. 23 .....3, 14, 15, 19
Sup. Ct. R. 19(b) 21
Sup. Ct. R. 24 1

IN THE

Supreme Court of the United States

October Term, 1975

Nos. 75-975 and 75-976

No. 75-975

GOVERNMENT OF INDIA,

Petitioner,

-against-

PFIZER INC., ET AL.

Respondents.

No. 75-976

IMPERIAL GOVERNMENT OF IRAN,

Petitioner,

-against-

PFIZER INC., ET AL.

Respondents.

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

This brief is filed pursuant to Supreme Court Rule 24 in opposition to the petitions for writs of certiorari of the Governments of India (hereinafter "India") and Iran (hereinafter "Iran").[1]

---

[1]Iran has adopted the Petition of India (Iran Petition, p. 2); therefore, statements in the India petition will be referred to from time to time as those of "petitioners."

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 522 F.2d 612 and appears as Appendix A to the India petition. The orders of the District Court are unreported, but they appear as Appendices B and C to the India petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petitions, except that the judgment of the Court of Appeals was entered on September 22, 1975, not on August 27, 1975.

QUESTION PRESENTED

The legal issue sought to be reviewed is:

> Whether the Eighth Circuit was correct in ruling that a foreign government may not maintain an antitrust treble-damage action under Section 4 of the Clayton Act as *parens patriae* or "official representative" of its corporate or individual citizens?

Petitioners' statement of the issue is misleading because it is qualified with assertions of fact which are not based on the record and not necessary to resolution of the issue properly presented.

STATUTES AND RULES INVOLVED

Section 4 of the Clayton Act (38 Stat. 731; 15 U.S.C. § 15) and Rule 23 of the Federal Rules of Civil Procedure, the texts of which may be found in Appendix A hereto, are the primary statute and rule involved in this matter.

STATEMENT[2]

Petitioners are two of nine foreign governments that have filed actions against these respondents claiming treble damages under Section 4 of the Clayton Act (15 U.S.C. § 15) for alleged violations of the antitrust laws of the United States. Seven of those cases, including those of the two petitioners, are still pending with a number of other cases in the District of Minnesota in coordinated proceedings under 28 U.S.C. § 1407.[3]

Each of the plaintiff foreign governments has alleged that it was injured by respondents' violations of the American antitrust laws, and these petitioners also seek to assert as *parens patriae* or "official representative" all claims the many millions of their individual and corporate citizens may have. Their complaints relate to the subject matter of the case with which this Court dealt in *United States v. Chas. Pfizer & Co.*, 404 U.S. 548 (1972), and are similar to the complaints in more than one hundred fifty other treble-

---

[2]Respondents take issue with Petitioner India's "Background Statement" (India Petition, pp. 8-11) containing numerous statements not of record and of questionable accuracy. For example, there is no record support for statements concerning foreign exchange control and other legislation or regulation by the Government of India.

[3]Actions by the State of Kuwait and the Government of Spain have been dismissed. The other cases brought by foreign governments are now pending before the Honorable Miles W. Lord in the District of Minnesota for consolidated pre-trial or for trial: The Republic of Viet-Nam v. Pfizer, Inc., Civil No. 4-71 Civ. 402 (D. Minn., filed Feb. 2, 1970); The Republic of Philippines v. Pfizer, Inc., Civil No. 4-72 Civ. 312 (D. Minn., filed Apr. 4, 1972); The Imperial Government of Iran v. Pfizer, Inc., Civil No. 7-74 Civ. 65 (D. Minn., filed Feb. 3, 1974); The Government of India v. Pfizer, Inc., Civil No. 4-74 Civ. 496 (D. Minn., filed Oct. 11, 1974); The Federal Republic of Germany v. Pfizer, Inc., Civil No. 4-74 Civ. 614 (D. Minn., filed Nov. 29, 1974); The Government of Colombia v. Pfizer, Inc., Civil No. 4-76-47 (D. Minn., filed Nov. 29, 1974); The Republic of Korea v. Pfizer, Inc., Civil No. 4-76-48 (D. Minn., filed Nov. 29, 1974).

damage actions, most of which were brought as class actions, against these respondents.[4]

The claims of the foreign sovereigns in these actions appear to be the first in the history of the American antitrust laws.[5] Respondents have taken the position in all of the actions that foreign sovereigns do not have standing to sue as "persons" under Section 4 of the Clayton Act and may not assert antitrust claims in a *parens patriae* or representative capacity. The District Court has ruled in favor of the foreign sovereigns on both issues.[6]

[4]The history and background of the antibiotic antitrust litigation, which followed Federal Trade Commission and Justice Department proceedings, has been summarized in Pfizer Inc. v. Honorable Miles W. Lord, 456 F.2d 532 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972), and West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2nd Cir.), *cert. denied*, 404 U.S. 871 (1971).

See also American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966); Chas. Pfizer & Co. v. FTC, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969); United States v. Chas. Pfizer & Co., 426 F.2d 32 (2d Cir. 1970), *aff'd by an equally divided Court*, 404 U.S. 548 (1972), *on remand*, 367 F. Supp. 91 (S.D.N.Y. 1973); North Carolina v. Chas. Pfizer & Co., 384 F. Supp. 265 (E.D.N.C. 1974), *aff'd* 1975-2 Trade Cases ¶ 60,663 (4th Cir. Jan. 12, 1976).

[5]The Government of India was named as a plaintiff along with a government-owned corporation similar to our T.V.A. and a number of government-owned public utilities in a group of cases that were part of the electrical equipment antitrust litigation. E.D. Pa. Civil Action Nos. 30965, 30967, 30971, 30973, and 30974. It is not clear whether India itself actually asserted claims. Nor is it clear whether the court's rulings in 1963 with respect to standing applied to the government or only to the government-owned corporations. The cases were not tried or officially reported.

[6]On September 18, 1969 the State of Kuwait filed an action against these respondents. On February 18, 1971, respondents moved to dismiss Kuwait's complaint on the ground that a foreign nation is not a "person" within the meaning of Section 4 of the Clayton Act and, therefore, lacked standing to sue. Judge Lord, sitting by designation in the Southern District of New York at that time, denied the motion in May 1971 and certified the question for interlocutory appeal under 28 U.S.C. § 1292(b). In Re Antibiotic Antitrust Actions; State of Kuwait v. Chas Pfizer & Co., et al., 333 F. Supp. 315 (S.D.N.Y. 1971). Judge Lord in denying the motion stated that his decision applied with equal force and effect to the then pending complaint of Vietnam. The Court of Appeals for the Second Circuit granted leave to appeal, but before the matter was briefed or argued, the Kuwait case was dismissed by stipulation.

Recognizing the importance of deciding the threshold issue of standing before the secondary question of whether the suits can be maintained in a *parens patriae* or representative capacity, respondents sought interlocutory appellate review of both issues under 28 U.S.C. § 1292(b). Petitioners acquiesced in certification of the secondary question for interlocutory appeal but objected to certification of the primary issue.[7] The District Court certified the *parens-patriae*/representative-capacity question but refused to certify the basic standing question at that time.

In April 1972, the Republic of the Philippines filed its suit. Respondents' responsive pleadings alleged the affirmative defense of lack of standing to sue under Section 4 of the Clayton Act. The Philippines moved to strike the defense. The motion was argued in November 1972 and all parties at that time agreed that the decision should again be certified for appeal. The matter was not decided until January 16, 1974, at which time the District Court directed that the affirmative defenses be stricken but did not certify the issue for interlocutory appeal.

On January 12, 1974, the Republic of Vietnam moved for leave to amend its complaint to assert claims of its citizens in a *parens patriae* capacity. The Imperial Government of Iran filed a complaint on February 6, 1974, that also asserted claims in a *parens patriae* capacity. When Vietnam was granted leave to amend, respondents immediately moved in March 1974 to dismiss the *parens patriae* claims of both Iran and Vietnam on the ground that such claims could be asserted only by the individuals to whom they belonged or in a proper class action. On June 17, 1974, Judge Lord denied respondents' motion to dismiss, holding that foreign governments, unlike the United States or any of the states of the union, may sue to recover "treble the damages said to have been suffered by individual citizens of these governments". (Appendix C to India Petition).

On October 15, 1974, India sued respondents, asserting not only its own alleged damages but also a claim for damages to its nationals based on *parens patriae* and "official representation." Two days later, respondents moved the District Court for an order dismissing the complaint on the ground that India lacked standing to sue for treble damages under Section 4 of the Clayton Act and dismissing the portions of the complaint claiming damages as *parens patriae* and as an "official representative." Judge Lord deferred ruling on the "person" issue, but decided that India, like Iran and Vietnam, could sue in a *parens patriae* or "official representative" capacity.

[7]See "Joint Appendix", p. 92a to the "Joint Brief for Petitioners-Appellants" filed with the Eighth Circuit and part of the record here (hereinafter referred to as "Joint Appendix"); Joint Appendix, p. 98a; Joint Appendix, p. 115a.

Respondents petitioned the Court of Appeals for a writ of mandamus to review the District Court's ruling on the standing issue in a further effort to have that primary issue resolved before, or together with, the *parens patriae* issue. Although the court consolidated the interlocutory appeal with the mandamus petition, it declined to issue the writ, holding that the District Court's ruling on that question did "not constitute a clear abuse of discretion"; thus it did not reach the legal question of standing, expressly stating that it "intimate[d] no view on the merits [of that issue.]" 522 F.2d at 615. On the certified interlocutory appeal, the Court of Appeals reversed the District Court, holding that foreign sovereigns cannot sue under the antitrust laws as *parens patriae* or in a representative capacity. It is this latter ruling which petitioners seek to bring here for review.

On December 27, 1975, shortly before this petition was filed, the District Court, reversing its previous position, did certify for interlocutory appeal its ruling on the basic standing or "person" issue. Respondents' application for permission to appeal having been granted on January 22, 1976, that issue is *now* pending in the Court of Appeals for a decision on its merits.[8]

Thus, petitioners, who have consistently opposed appellate review of the fundamental issue of their standing to sue under the Clayton Act, are seeking review of the subsidiary issue of their ability to claim in the additional capacity of *parens patriae* or "official representative" while the underlying question is still pending before the Court of Appeals.

---

[8]A copy of the order of the Court of Appeals in docket number 76-1064 is attached hereto as Appendix B. The "person" issue was certified in two other foreign government cases — the Philippines and Vietnam cases — in addition to petitioners' cases.

REASONS THE WRIT SHOULD NOT BE GRANTED

The issue raised by petitioners does not warrant review by this Court on certiorari. (1) The issue of whether foreign sovereigns can sue under the antitrust laws as *parens patriae* or in a representative capacity should not be decided until the basic question of whether foreign sovereigns have standing to sue in *any* capacity under those laws is resolved. Without a resolution of that question, there is no basis for petitioners' assertion that the decision of the Court of Appeals on the *parens patriae* or representative capacity issue is of any consequence to administration of the American antitrust laws, to American foreign economic relations, or to issues implicating the sovereignty of nations. (2) The decision of the Eighth Circuit is correct. (3) There is no conflict in the decisions on the issues raised by petitioners.

I.

THE QUESTION WHETHER FOREIGN SOVEREIGNS CAN SUE UNDER THE ANTITRUST LAWS AS *PARENS PATRIAE* OR AS "OFFICIAL REPRESENTATIVES" SHOULD NOT BE DECIDED BEFORE THE BASIC QUESTIONS OF THE STANDING OF FOREIGN SOVEREIGNS TO SUE IN ANY CAPACITY UNDER THOSE LAWS IS RESOLVED.

The antitrust complaints of these petitioners present two questions regarding their capacity to maintain these actions. *First*, the basic question of whether a foreign sovereign is a "person" within the meaning of Section 4 of the Clayton Act (15 U.S.C. § 15) with standing to sue in *any* capacity under the American antitrust laws. *Second*, the subsidiary question of whether, if a foreign government does have standing to sue under the antitrust laws, it can sue as *parens patriae*

or as "official representative" for injuries allegedly suffered by its citizens who themselves are entitled to sue directly.

Petitioners are asking this Court, as they asked the Court of Appeals, to deviate from a logical sequence of decision and resolve the subsidiary issue before deciding the primary question. In effect, they are not only asking for resolution of a legal issue that may be academic, but also seeking to have the Court approach resolution of that secondary issue —whether a foreign government can sue as *parens patriae*— without benefit of a prior analysis of the bases, if any, in policy and law, upon which a foreign sovereign can sue at all.

The District Court's holding that a foreign sovereign has standing to sue in any capacity under the antitrust laws presents serious questions of law and policy which, when eventually resolved, may make academic the further question whether a foreign sovereign can sue as *parens patriae* or in a representative capacity. Now that the basic standing issue is before the Court of Appeals for the Eighth Circuit on interlocutory appeal certified under 28 U.S.C. § 1292(b), that court can review the merits of the District Court's holding, which it had declined to do when the question was before it on petition for a writ of mandamus.

When the standing question is presented to this Court for review, it will turn upon the correct interpretation to be placed on § 4 of the Clayton Act, which limits damage actions to

> Any *person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . (emphasis added).

Since the United States has been held by this Court not to be a "person" within the meaning of that section, *United*

States v. Cooper Corp., 312 U.S. 600 (1941), it seems anomalous to suppose that Congress had given foreign sovereigns rights under the antitrust laws it denied to our own government. Even when Congress amended the Clayton Act fourteen years after the *Cooper* decision to give the United States a damage remedy, it permitted only single damages (15 U.S.C. § 15a), not the treble damages petitioners are claiming here.

While this Court did hold that the states of the union are "persons" under the Clayton Act, *Georgia v. Evans*, 316 U.S. 159 (1942), it distinguished a state from the United States on the grounds that (1) it was inconceivable Congress intended to deny states the right to sue and (2) states, unlike the United States, are not in a position to protect themselves fully against antitrust violations without recourse to treble damage actions.

Foreign governments, unlike the states of the union, *are* in a position to protect themselves fully against antitrust violations. In fact, they can exercise unlimited power to regulate business, control the grant and enforcement of patents, control prices and profits, subsidize or protect local competitors, and impose taxes and duties, and can also confiscate, exclude, nationalize, or close their borders to, American businesses.

While it may be inconceivable to suppose that Congress would not have given the several states a right to sue for treble damages under the antitrust laws, it is not difficult to conceive of strong reasons why Congress might withhold that right from foreign sovereigns. In fact, it is difficult to imagine why Congress would have given a remedy to foreign sovereigns while denying it to the United States or why it would have conferred the generous remedy of treble dam-

ages on foreign sovereigns unilaterally, thereby impairing the ability of our government to negotiate treaties with foreign nations requiring them to confer reciprocal rights on the United States.[9]

The Court should not undertake to resolve the question whether foreign sovereigns can sue as *parens patriae* or in a representative capacity before it has decided whether they can sue at all.

Analysis of petitioners' arguments demonstrates how interwoven the policy and legal issues underlying the two questions are and, indeed, how often those very arguments undercut petitioners' position on the basic standing issue—a fact that may explain why petitioners have resisted appellate review of both issues at one time.

For example, petitioners argue that because the responsibilities of a foreign sovereign to its citizens differ greatly from those of a state to its citizens, it is more appropriate to look for analogy to the rules of standing applied to our federal government than to those applicable to our state governments.[10] Whatever support that argument gives to petitioners' effort to avoid application to them of this Court's recent holding that states cannot sue as *parens patriae*,[11] it gives even greater support to respondents' view

[9]Nothing is found in the legislative history which suggests that foreign governments were to be given the right to bring suit. In debates centering around what later became Section 7 of the Sherman Act, Senators Hoar and Sherman discussed the purpose of that proposal. These remarks are of particular significance since Senator Hoar was to become the primary draftsman of the Sherman Act in its final form. United States v. Cooper Corp., *supra*, 312 U.S. at 612. In response to a question by Senator Hoar, Senator Sherman stated:

> MR. SHERMAN . . . but the second section provides purely a personal remedy, a civil suit also by *citizens of the United States*. 21 CONG. REC. 2564 (1890) (emphasis added).

[10]India Petition, p. 18.

[11]Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

that foreign sovereigns are not "persons" (just as the United States government is not a "person") with standing to sue under Section 4 of the Clayton Act.

Similarly, the argument underlying petitioners' scarcely veiled threats that, unless foreign governments have a right to sue as *parens patriae* for antitrust violations, they may consider "less desirable" means to protect their national interests, may not approach their debt burdens to the United States with the "good grace" shown in the past, may subject American enterprise "to political reactions in host countries," and may reject American efforts to encourage them to undertake their own antitrust initiatives,[12] more strongly supports the conclusion that foreign sovereigns should be denied standing to sue under the antitrust laws in *any* capacity than the suggestion that they be allowed to sue as *parens patriae*. While one might hope, as petitioners' counsel hope, that the grant to foreign governments of a right to sue as *parens patriae* would inspire reciprocal fairness to America and American businesses and respect by foreign governments for antitrust principles, that hope can never reach the level of assurance unless the right to sue is granted through legislative and diplomatic channels with provision for reciprocal agreements in exchange for the rights conferred. As the Court of Appeals stated:

> The remedy plaintiffs seek, if it can be made available at all, must come from Congress, who is best able to weigh its economic and political consequences and to consider alternative means of enforcing the antitrust laws of the United States. 522 F.2d at 620.

Petitioners' argument that foreign nations must have a right to sue as *parens patriae* lest socialist governments be

[12]India Petition, pp. 12, 15, 16.

favored over those with free and mixed economies[13] is an equally strong argument for denying foreign governments standing to sue under the antitrust laws at all. Denial of standing to foreign governments to sue under our antitrust laws would eliminate any discrimination in favor of or against socialist states. Individuals and private corporations in those foreign nations with free or mixed economies would continue to have the right to sue under our antitrust laws and continue to be subject to those laws. Foreign sovereigns, on the other hand, which have thus far enjoyed immunity from our antitrust laws, would not be placed in the favored position of enjoying the benefits of our antitrust laws without being subject to their restrictions.[14] Unless whatever rights a foreign sovereign is to have to maintain an action under our antitrust laws as *parens patriae* are specifically granted *and qualified* by Congress, we will find such foreign governments as petitioner Iran, an active participant in the OPEC cartel, asserting in our courts rights broader than those enjoyed by any other class of antitrust claimant and, at the same time, asserting an absolute immunity from claims or counterclaims for injury our citizens have suffered as a result of their own acts in restraint of trade—acts which, unlike those of our own

[13]India Petition, p. 18.

[14]Recent case law has observed the unique position of foreign governments to regulate, even arbitrarily, their economic affairs with no responsibility under American laws. For example, certain seemingly arbitrary policies of the Venezuelan government in its dealings with petroleum exporters were immunized from antitrust scrutiny in the recent case of Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970). In Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), the actions of the Persian Gulf sheikdom of Sharjah together with the government of Iran, in seizing the off-shore drilling concessions granted by the sheikdom of Umm al Quaywayn, were likewise held to be beyond the jurisdiction of the antitrust laws.

federal and state governments, are not subject even to constitutional limitation.

Of all of the arguments petitioners make in support of their position that they should be entitled to sue as *parens patriae*, perhaps the one that cuts most strongly against them on the basic issue of their standing to sue in any capacity is their recurring theme of "affront to the sovereign". They argue that once a foreign nation is in court as a claimant for injury to its business or property, it is an affront to the sovereignty of that nation to question the validity or fairness of its appropriation of other claims its citizens might have, its assertion of a legal obligation to sue on behalf of its citizens, the adequacy of representation it will give to its citizens, the fairness of the manner in which it would distribute any recovery to those of its citizens it is representing, and perhaps even the *res judicata* effect of the *parens patriae* recovery on subsequent individual claims by its citizens.[15] If, indeed, it is an affront to sovereignty for our courts to ask a foreign-government plaintiff to observe the same standards of fairness and due process imposed on other antitrust claimants, it is better that those foreign sovereigns not be in our courts asserting antitrust claims until Congress or our diplomats have resolved those potential affronts.

Petitioners may argue that, although it might be better to resolve both the "person" and the *parens patriae* issues together, failure to grant certiorari now on the *parens patriae* issue would preclude review of that issue later if this Court were to grant certiorari with respect to the decision the Court of Appeals will render on the "person" issue in the pending interlocutory appeal. That is a possibility of which petition-

[15]India Petition, pp. 21, 23, 26, 27.

ers presumably were aware when they opposed all efforts to have both issues resolved together. However, even if this potential problem had not been one of their own making, it would be no justification for asking this Court to depart from a logical order of decision-making, to devote its time to deciding issues that may be academic, and to deal with a secondary issue before the primary issue is resolved and before the policy and legal premises on which that resolution depends are defined.

II.

THE DECISION BELOW IS CORRECT.

The decision of the Court of Appeals holding that petitioners may not sue in a *parens patriae* or "official representative" capacity is consistent with controlling precedent and is supported by principles of international law.[16]

The Court of Appeals based its decision on three primary principles.

First, it recognized that as a general rule the right of a government to sue as *parens patriae* for the general welfare of its citizens at large is limited to suits "to prevent or

[16]The specific holding of the Court of Appeals was stated as follows:

> We reverse, and hold that the plaintiff governments may not sue on behalf of their citizens' antitrust damage claims as parens patriae. A parens patriae action cannot be brought to collect the damage claim of one legally entitled to sue in his own right. The mere fact that the claimant or creditor is a foreign national does not afford him or his government access to judicial procedures barred to domestic creditors. Finally, we are unable to dismiss so easily as did the district court the due process implications of the procedure plaintiffs ask us to approve. In our view, plaintiffs may represent their citizens' damage claims only if they can do so within a Rule 23 class action. 522 F.2d at 616.

repair harm to its 'quasi-sovereign' interests,"[17] and that quasi-sovereign interests have been defined by this Court as "interest[s] apart from [those] of particular individuals who may be affected,"[18] and are different from the sovereign's proprietary interests. The court concluded that the interests relied on by the foreign government plaintiffs are clearly not of this type and therefore dismissed the *parens patriae* or "official representative" claims under the authority of *Hawaii v. Standard Oil Co., supra.*[19]

Second, the Court of Appeals reasoned that this Court has expressed a preference for class actions as opposed to *parens patriae* actions as a means of bringing representative suits under the antitrust laws, *Hawaii v. Standard Oil Co.*, 405 U.S. at 265-66, and that petitioners' status as foreign sovereigns does not justify deviation from that preference or require relaxation of the protective limitations of Rule 23, Fed. R. Civ. P. The Court said:

[17]Hawaii v. Standard Oil Co., *supra*. Other cases relied on by the Court of Appeals as authority for the general rule that states cannot maintain antitrust actions as *parens patriae* include: In Re Multidistrict Vehicle Air Pollution, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 309 F. Supp. 1057 (E.D. Pa. 1969), *aff'd sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971).

[18]Georgia v. Pennsylvania R.R., 324 U.S. 439, 451 (1945).

[19]Petitioners have attempted to create some distinction between their claims "as *parens patriae*" and their claims under a doctrine they call "official representative." The need for such a distinction derives from their apparent recognition that the *parens patriae* doctrine as set forth in many decisions by this Court and lower courts cannot embrace petitioners' claim (India Petition, pp. 10-11: "But *parens patriae* jurisdiction has had limited application in practice"). Thus they set forth a new theory entitled "official representative," for which they can cite no legal precedent and for which there is in fact no legal support. No matter what terminology is employed, however, petitioners seek damages for alleged injury to the business and property of an unidentified group of their citizens without undertaking to provide any of the safeguards for the absent claimants *or* for respondents that are required by Rule 23 of the Federal Rules of Civil Procedure.

> Principles of comity, international law and existing United States treaties do not afford foreign sovereigns the right to press their citizens' claims in a manner barred to domestic states vis-a-vis their citizens. Reliance on authorities which sanction a sovereign's right to represent its citizens when their claim is against another sovereign who had not consented to suit in its own courts is misplaced. Foreign creditors are to be afforded legal access to our courts on the same basis as United States residents; practical difficulties notwithstanding, their status as foreigners does not entitle them to a more favorable remedy and procedures. 522 F.2d at 618-19.

Third, the Court of Appeals suggested that, while the United States Constitution does not bind foreign governments in relationships with their nationals, when rights of non-resident aliens to property within the United States are adjudicated in United States courts, aliens may well be entitled to due process protection.[20] It saw no need to decide that issue, however, in view of the clear preference for class actions in antitrust cases expressed in the *Hawaii* case.

The reasoning of the Court of Appeals is entirely sound, its opinion is consistent with the applicable opinions of this Court, and no review of its decision is warranted. Neither of petitioners' major arguments to the contrary alters this conclusion.

Petitioners argue first that the Court of Appeals, by applying the same analyses to the *parens patriae* claims of foreign sovereigns as it applied to the states of the United States, failed to make the necessary concession to foreign and international elements involved in these cases. Petitioners maintain that if the rules applicable to suits by the United States government in a representative capacity were applied here, they would have the right to assert such claims.[21]

[20]Sardino v. Federal Reserve Bank, 361 F.2d 106, 111 (2d Cir. 1966).

There is, of course, no judicial authority in the United States (and, indeed, there will never be judicial authority in the United States so long as we have our Constitution) to support the notion that the United States government could arbitrarily appropriate for itself the antitrust claims given by Congress to injured "persons".

The two cases cited by petitioners in support of their position that the United States would have the right to sue in a representative capacity in comparable circumstances do not support their arguments. There was no suggestion in either case that the United States would appropriate for its own benefit the claims of the injured parties or that defendants would be exposed to potential multiple liability for the same injury. *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888), was a suit to cancel a land patent and did not involve claims for damages. *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970), was a suit for injunction and accounting seeking restitution only on behalf of those injured parties who appeared and established a right to relief.

Petitioners also argue that the decision of the Court of Appeals is inconsistent with the rule of international law that, when a foreign sovereign espouses a private claim and presents it for payment, our own government does not normally inquire as to how the foreign sovereign will dispose of those proceeds. [22] That is a rule, however, which is applied in negotiated, voluntary transactions involving payments

[21]India Petition, p. 18.
[22]India Petition, p. 23.

out of the government treasury and not to litigation involving private property.

Petitioners, recognizing that our courts have uniformly refused to give effect to foreign confiscatory decrees purporting to divest foreign nationals of property within the United States,[23] also argue that the Court of Appeals was wrong in construing the assertion of claims in a representative capacity by a foreign sovereign as a "taking".[24]

It does not matter what terminology is applied to the process by which individual claims pass involuntarily from the persons injured to the sovereign. The cause of action under Section 4 of the Clayton Act is provided to those who were injured in their business or property. Petitioners admit that if they have acquired the claims of their citizens, they have done so without the consent of the citizens and without compensation, and they admit further that they do not intend to distribute the proceeds to the injured persons.[25] Thus, their actions are not brought to compensate persons who were injured in their business or property and consequently are not suits authorized by Congress under Section 4 of the Clayton Act.

III.

THERE IS NO CONFLICT OF DECISIONS

Petitioners have also urged that the writs of certiorari should be granted to resolve conflicts between decisions of different Courts of Appeals and conflicts between the deci-

[23]Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 447 (1964). *See also* Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir. 1972).

[24]India Petition, p. 27.

[25]India intends to allocate any recovery "based on present needs," not on "past purchases." India Petition, p. 9. Iran has decreed that any recovery will be distributed to charity, not to injured parties. Iran Petition, p. 10.

sion of the Eighth Circuit and decisions of this Court. The fact is, however, that the Court of Appeals securely based its decision on recent opinions of this Court and on decisions of other courts that are not in conflict with other authorities.

Petitioners correctly point out that the Court of Appeals found an overwhelming public policy preference for class actions as opposed to *parens patriae* claims.[26] Their assertion that dictum in *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971), is inconsistent with that policy ignores the fact that *West Virginia* was decided before this Court's clear statement in *Hawaii v. Standard Oil Co., supra,* concerning the use of *parens patriae* claims to circumvent the requirements of Rule 23 and involved a settlement mechanism complying fully with Rule 23 that was the product of agreement among the parties.

Petitioners also argue that the decision of the Court of Appeals is in conflict with *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Petitioners' argument is based on a wrong reading of *Hanover Shoe*. That case does not stand for the principle that the courts must always adopt those principles of law which permit the easiest and biggest antitrust judgment for treble-damage plaintiffs. In fact, this Court, by denying states the right to sue as *parens patriae*, would, by petitioners' logic, be as guilty as the Eighth Circuit, of failure to follow *Hanover Shoe*.[27]

[26]*See* India Petition, p. 29.

[27]Hawaii v. Standard Oil Co., *supra*. It is interesting to note that both the Hart-Scott Bill and the Rodino Bill, which were introduced in Congress after this Court's decision in that case would, if enacted, give a right to sue as *parens patriae* only on behalf of the several states. S. 1284, 94th Cong., 1st Sess. (1975); H.R. 12921, 93d Cong., 2nd Sess. (1974). The pendency of antitrust *parens patriae* bills in Congress also

Granting that *Hanover Shoe* does express a general policy favoring private antitrust enforcement, it cannot be assumed, as petitioners argue without benefit of support from the record, that unless foreign governments are allowed to sue as *parens patriae* or in a representative capacity, private antitrust enforcement with respect to foreign commerce will be ineffective.[28]

Citizens of foreign countries have historically had a right to recover treble damages for injuries suffered as a result of violations of our antitrust laws, and, contrary to petitioners' assertions, have, in fact, exercised that right,[29] and, as petitioners themselves have emphasized, foreign sovereigns have ample power to enact and enforce antitrust statutes within their own jurisdictions as many sovereigns so forcefully have done.[30]

---

weighs against the grant of certiorari here. If there are reasons to permit antitrust suits by foreign governments as *parens patriae*, Congress can weigh those reasons with the help of testimony from the State, Treasury, Justice, and all other affected executive departments, in connection with its overall consideration of those pending bills.

[28]India Petition, p. 12.

[29]The Department of Justice did not, as petitioners claim, say in its amicus brief filed with the Eighth Circuit that it knew of only two instances in which foreign plaintiffs had brought suit under the antitrust laws. India Petition, p. 11. In addition to the two cases mentioned by the Department of Justice and cited by petitioners, there are numerous others. *See e.g.*, Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 375 F. Supp. 610 (E.D. Pa. 1974) (Plaintiff was a Bahamian corporation); Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement, 451 F.2d 727 (2d Cir. 1971), *cert denied*, 406 U.S. 906 (1972) (Swiss corporation v. French corporation); Gretener, A. G. v. Dyson-Kissner Corp., 298 F. Supp. 350 (S.D.N.Y. 1969) (Plaintiff was a Swiss corporation).

[30]*See e.g.*, United Brands Company, 2 CCH Comm. Mkt. Rep. § 9800 (Dec. 17, 1975).

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the requirements of Supreme Court Rule 19(b) have not been met and that these petitions should be denied.

Dated: February 9, 1976

Respectfully submitted,

SAMUEL W. MURPHY, JR.
Donovan Leisure Newton
and Irvine
30 Rockefeller Plaza
New York, New York 10020
212-489-4118

PETER DORSEY
MICHAEL E. BRESS
Dorsey, Windhorst, Hannaford,
Whitney & Halladay
2300 First National Bank Building
Minneapolis, Minnesota 55402
612-340-2607

Counsel for American Cyanamid Company

JULIAN O. VON KALINOWSKI
ROBERT E. COOPER
Gibson, Dunn & Crutcher
515 South Flower Street
Los Angeles, California 90071
213-488-7000

JOE A. WALTERS
O'Connor & Hannan
3800 IDS Tower
Minneapolis, Minnesota 55402
612-341-3800

JOHN H. MORRISON
Kirkland & Ellis
200 East Randolph Drive
Chicago, Illinois 60601
312-861-2000

Counsel for Pfizer Inc.

MERRELL E. CLARK, JR.
Winthrop, Stimson, Putnam
& Roberts
40 Wall Street
New York, New York 10005
212-WH 3-0700

Counsel for Bristol-Myers Company

ROBERTS B. OWEN
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006
202-452-6000

Counsel for The Upjohn Company

ALLEN F. MAULSBY
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005
212-HA 2-3000

Counsel for Squibb Corporation and Olin Corporation

GORDON C. BUSDICKER
Faegre & Benson
Northwestern Bank Building
Minneapolis, Minnesota 55402
612-338-7571

Counsel for Bristol-Myers Company, The Upjohn Company, Squibb Corporation and Olin Corporation

APPENDIX A

Section 4, Clayton Act (38 Stat. 731; 15 U.S.C. §15)

§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Rule 23, Federal Rules of Civil Procedure

Rule 23.

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequate protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

76-1064 September Term, 1975

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, E. R. SQUIBB & SONS, INC., OLIN CORPORATION and the UPJOHN COMPANY,

Appellants,

vs.

THE GOVERNMENT OF INDIA, THE REPUBLIC OF VIETNAM, THE IMPERIAL GOVERNMENT OF IRAN, and THE REPUBLIC OF THE PHILIPPINES by and through the Central Bank of the Philippines,

Appellees.

Appeal from the United States
District Court for the
District of Minnesota

The court has considered an application for leave to take interlocutory appeal pursuant to 28 U.S.C. §1292(b) together with memorandums opposing the petition and, being fully advised in the premises, it is now here ordered that the petition to take interlocutory appeal be, and it is hereby, granted. The clerk of this court is directed to regularly docket this appeal.

January 22, 1976